ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

State of West Virginia, *et al.*,
***Petitioners*,**

v.

United States Environmental Protection Agency,
and Regina A. McCarthy, Administrator,
***Respondents*.**

BRIEF OF AMICI PACIFIC LEGAL FOUNDATION, TEXAS PUBLIC POLICY FOUNDATION, MORNING STAR PACKING COMPANY, MERIT OIL COMPANY, THE LOGGERS ASSOCIATION OF NORTHERN CALIFORNIA, AND NORMAN R. "SKIP" BROWN IN SUPPORT OF PETITIONERS

ROBERT HENNEKE
Texas Bar No. 24046058
LEIGH THOMPSON
Texas Bar No. 24093255
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728
Email: rhenneke@texaspolicy.com

THEODORE HADZI-ANTICH
D.C. Circuit Bar No. 53056
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tha@pacificlegal.org

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Parties and *Amici*

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel for *amici* certify as follows:

A. Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Joint Petitioner Brief.

Louisiana Public Service Commission from 15-1464 (Gibson, Monica)
Filed Docketing Statement and Statement of Issues
Monica Derbes Gibson
Lesley Foxhall Pietras
Liskow & Lewis, PLC
701 Poydras Street, Suite 500
New Orleans, LA 70139
mdgibson@liskow.com
lfpietras@liskow.com

Southeastern Legal Foundation (Hermann, Kimberly)
Motion to Participate as Amicus
Southeastern Legal Foundation, Inc.
2255 Sewell Mill Road, Suite 320
Marietta, GA 30062
khermann@southeasternlegal.org

Energy and Environmental Legal Institute (Mandelbaum, Chaim)
For Leave to File Brief
Chaim Mandelbaum
Free Market Environmental Law Clinic
726 N. Nelson Street, Suite 9
Arlington, VA 22203
chaim12@gmail.com

Buckeye Institute for Public Policy Solutions, et al. (Gustafson, Adam)
Motion for Leave to File Supplement and Separate Statutory Addendum
Sam Kazman
Hans Bader
Competitive Enterprise Institute
1899 L. St. NW, 12th Floor
Washington, D.C. 20036
Sam.kazman@cei.org

Robert Alt
Buckeye Institute for Public Policy Solutions
88 E. Broad Street, Suite 1120
Columbus, OH 42315
Robert@buckeyeinstitute.org

C. Boyden Gray
Adam R.F. Gustafson
Derek S. Lyons
James R. Conde
Boydon Gray & Associates
1627 I Street NW, Suite 950
Washington, D.C. 20006
Gustafson@boydengrayassociates.gov

60Plus Association, et al. (Cecere, Joseph)
Motion to Participate as *Amicus*
J. Carl Cecere
Cecere PC
6035 McCommas Blvd.
Dallas, TX 75206
j.carl.cecere@gmail.com

Kimberly N. Brown
Brown Legal Consulting, LLC
15 E. Irving Street
Chevy Chase, MD 20815
(no email provided)

Denbury Onshore, LLC (Stetson, Catherine)
Statement of Issues and Docketing Statement
Catherine E. Stetson
Eugene A. Sokoloff
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
Cate.steston@hoganlovells.com

B. Rulings Under Review

References to the rulings at issue appear in the Joint Petitioner Brief.

C. Related Cases

References to related cases appear in the Joint Petitioner Brief.

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INTEREST OF *AMICI CURIAE*

Pacific Legal Foundation ("PLF") is the most experienced nonprofit litigation-oriented public interest foundation of its kind in the United States. For over 40 years, PLF has litigated in support of a reasonable balance between regulatory efforts to protect the environment and the guarantees of individual freedom and property rights that form the foundations of liberty. PLF submitted *amicus* briefs in several Supreme Court cases addressing greenhouse gas regulations, including *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), *American Electric Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), and *Massachusetts v. EPA*, 549 U.S. 497 (2007). In addition, Pacific Legal Foundation was a petitioner in this Court in the consolidated cases challenging the first round of EPA regulation of greenhouse gases under the Clean Air Act, known as the Endangerment Finding, *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). Pacific Legal Foundation's attorneys also served as lead counsel in this Court in challenges to EPA's mobile source greenhouse gas regulations, *California Construction Trucking Association, Inc. v. EPA*, No. 13-1076 (D.C. Cir. filed Mar. 25, 2013), and *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875 (D.C. Cir. 2015).

Texas Public Policy Foundation is a nonprofit, nonpartisan research institution based in Austin, Texas. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and

affecting policymakers and the Texas public policy debate with academically sound research and outreach. The Foundation's guiding principles have led it to speak out and oppose federal abuse and overreach in the area of environmental policy through its Armstrong Center for Energy and the Environment.

Morning Star Packing Company ("Morning Star") is a bulk processor of tomato products with locations in California. Morning Star relies on natural gas boilers for production of their tomato products. Its emissions of carbon dioxide are heavily regulated by California's Cap and Trade Regulation governing greenhouse gas emissions. The Clean Power Plan will increase Morning Star's costs of securing fuels for its boilers.

Merit Oil Company ("Merit Oil") is a family business that has operated in California for three generations. Merit Oil stores, transports, and wholesales a variety of petroleum products, including gasoline, diesel fuels, solvents, and kerosene. Merit Oil's costs of doing business will increase as a result of the Clean Power Plan.

Loggers Association of Northern California ("LANC") is a California nonprofit trade association whose mission is to support, promote, and advocate for the economic interests of its members, who are businesses involved in the logging industry in Northern California. LANC has 160 members, including many family logging businesses that have operated in California for generations. LANC is concerned that

the Clean Power Plan will increase energy costs for its members, thereby adversely impacting their economic interests.

Norman R. "Skip" Brown is an individual residing in California who does not want his electric bills to increase as a result of the Clean Power Plan and who is concerned about the likelihood that the Clean Power Plan will create brownouts and blackouts adversely impacting his quality of life.

SUMMARY OF ARGUMENT

On October 23, 2015, the Environmental Protection Agency ("EPA") promulgated the Clean Power Plan, which regulates carbon dioxide emissions from existing power plants under section 111(d) of the Clean Air Act ("Clean Air Act" or the "Act"). *See* 42 U.S.C. § 7411(d); 80 Fed. Reg. 64,661 (Oct. 23, 2015).

For three reasons, EPA's Clean Power Plan violates the Clean Air Act. First, if EPA is to regulate carbon dioxide emissions from stationary sources, EPA must proceed under Section 108 of the Act and not under Section 111. Section 108 is the regulatory path Congress prescribed for air pollutants in the "ambient air" emitted from "numerous or diverse" sources, while Section 111 is the path for emissions from specific source categories that pose more localized air pollution concerns. It is irrefutable that carbon dioxide is an ubiquitous substance that is emitted into the "ambient air" from "numerous or diverse" sources. Consequently, EPA's regulation of carbon dioxide emissions from stationary sources should have proceeded, if at all,

under Section 108 of the Act and not under Section 111. Accordingly, EPA's regulation of carbon dioxide from electric power plants under Section 111 is impermissible.

Second, the Act does not permit EPA to regulate emissions from stationary sources under Section 111 when emissions from such sources are already regulated under Section 112. Coal-and-oil-fired electric generation unit emissions have been regulated under Section 112 since December 20, 2000. On February 16, 2012, EPA began regulating all fossil fuel-fired electric generation unit emissions under Section 112. Accordingly, emissions from such electric generation units may not be regulated now under Section 111.

Third, EPA failed to make a proper endangerment finding, which is a prerequisite to regulating emissions from any stationary source category under Section 111. EPA asserts that the endangerment finding it made in 2009 in connection with mobile source emissions under Section 202 is sufficient because it provides a "rational basis" for the Clean Power Plan. It is not and does not. The endangerment finding made by EPA under Section 202 is not a finding that *carbon dioxide* emitted by *stationary* sources endangers public health and welfare, as required by Section 111. Rather, it is a finding that a *suite* of six greenhouse gases emitted from *mobile* sources endangers public health and welfare. Due to the substantial differences in the nature of stationary and mobile sources, Congress created different statutory regimes in

which each source category must operate and comply. The statutory criteria that EPA must use in making endangerment findings under Section 111 and Section 202 of the Act are markedly different. A finding under Section 111 requires that emissions from a specific stationary source category endanger public health and welfare. On the other hand, the finding under Section 202 requires that emissions from all mobile sources combined endanger public health and welfare. It is impermissible for EPA to substitute one finding for the other. Accordingly, EPA failed to make a proper endangerment finding under Section 111 to support its promulgation of the Clean Power Plan.

In addition to its illegality under the Act, the Clean Power Plan is unconstitutional. A federal agency may not disrupt the established constitutional balance between the states and the federal government in an area traditionally regulated by states unless the statute under which the agency acts is abundantly clear and compels the intrusion. Since at least 1964, the national electric power system has been characterized by a "bright line" divide between federal authority over wholesale sales of power in interstate commerce, regulated by the federal government, and state authority over planning, siting, and providing generation resources to local customers. The Clean Power Plan forces states to require entirely in-state electricity generators to produce electricity by using renewable sources of energy rather than fossil fuels, thereby directing the manner in which electricity is generated in each state. The Act

does not authorize EPA to regulate the system of power generation within each state, let alone require states to do what it cannot do itself. Accordingly, the Clean Power Plan unconstitutionally usurps state powers in violation of the Tenth Amendment.

ARGUMENT

I

IF EPA IS TO REGULATE CARBON DIOXIDE FROM STATIONARY SOURCES, IT MUST DO SO UNDER SECTION 108 OF THE ACT AND NOT UNDER SECTION 111

A. The Statutory Structure of the Clean Air Act Forbids the Clean Power Plan as Promulgated by EPA

The regulation of the ubiquitous substance carbon dioxide has enormous national implications. Through the Clean Power Plan, EPA has used Section 111 to regulate carbon dioxide emissions from electric generation units, thereby regulating the entire electric power grid of the United States. EPA cannot rely on deference to its views under these circumstances. *See Utility Air Regulatory Group v. EPA*, 134 Sup. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal citations and quotations omitted).

The Clean Air Act establishes a complex regulatory scheme through distinct administrative programs targeted at different types and sources of air pollutants. Stationary sources of air pollution are regulated under Title I of the Act, while mobile sources are regulated under Title II.

EPA promulgated the Clean Power Plan under Title I, which contains three regulatory programs, each with its own unique purposes, triggers, and substantive provisions. By regulating carbon dioxide emissions from electric generating units under Section 111 of the Act, which embodies Title I's source-performance program, rather than under Sections 108-110 of the Act, which embody Title I's ambient air quality program, EPA acted impermissibly.

Title I authorizes EPA to establish National Ambient Air Quality Standards ("NAAQS") under Sections 108 through 110 of the Act. 42 U.S.C. §§ 7408-7410. NAAQS prescribes maximum, uniform ambient air concentrations of particular air pollutants, and no area of the nation may exceed the prescribed concentrations set by EPA, usually expressed as parts per million of a particular pollutant. *See generally*, George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts v. EPA*, 44 U. Rich. L. Rev. 919 (Mar. 2010). In turn, states are responsible for attaining and maintaining NAAQS within their jurisdictions. EPA has set NAAQS

for six air pollutants.[1] 40 C.F.R. §§ 50.2-50.16. Such air pollutants are generally referred to as "criteria pollutants." To designate a particular air pollutant as a criteria pollutant, EPA must first make a finding under Section 108 that the pollutant is emitted from "numerous and diverse" sources and "endangers" public health or welfare. 42 U.S.C. § 7408(a)(4). The NAAQS regulatory program has been characterized as "the engine that drives nearly all of Title I." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001).

Title I also contains the source-performance program of Section 111, under which EPA regulates air emissions from specific categories of sources for which a unique, source-category endangerment finding is made. 42 U.S.C. § 7411(b)(1)(A). Generally, Section 111(d) regulates existing sources, while section 111(b) regulates new and modified sources. Pollutants regulated under Section 111 are referred to as "designated pollutants" and are regulated under guidelines "developed for specialized types of emission sources that emit discreet types of pollutants." *See generally*, 40 C.F.R. § 62. As indicated, EPA promulgated the Clean Power Plan under Section 111(d) of the Act.

The third regulatory program under Title I, set forth in Section 112, authorizes EPA to regulate hazardous air pollutants deemed particularly dangerous to human

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[1] NAAQS have been set for lead, nitrogen dioxide, particulate matter PM10, particulate matter PM2.5, carbon monoxide, ozone, and sulfur dioxide.

health by imposing strict national emissions standards for specific source categories of such pollutants. 42 U.S.C. § 7412.

Sections 108-110, as well as the structure of the Clean Air Act as a whole, and of Title I in particular, make clear that air pollutants emitted from "numerous or diverse" sources into the "ambient air" that endanger public health or welfare must be regulated, if at all, as criteria pollutants under the NAAQS program and not under the source-performance program of Section 111. The Act explicitly provides that EPA "shall" regulate under the NAAQS program air pollutants "the presence of which in the ambient air results from numerous or diverse" sources where such pollutants "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). After EPA makes an endangerment finding under Section 108 and issues air quality criteria for pollutants subject to that finding, Section 109 requires EPA to "publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date." 42 U.S.C. § 7409(a)(1). Thus, promulgation of ambient air quality standards under the NAAQS program is the specific regulatory mechanism that EPA is required to use when regulating air pollutants emitted from "numerous or diverse" sources that "endanger public health or welfare." Importantly, Section 111 was not structured to be an alternative to the NAAQS process but only

a supplement to it. *Natural Resources Defense Council v. Train*, 545 F.2d 320, 327 (2d Cir. 1976) ("Under the scheme of the Act, emission source control is a supplement to air quality standards, *not* an alternative to them.") (emphasis added). Because carbon dioxide is a ubiquitous substance in the "ambient air" emitted from "numerous or diverse" sources, if it is to be regulated under Title I of the Act, the mechanism by which EPA may do so is limited to the NAAQS program under Sections 108-110.[2] Accordingly, EPA's promulgation of the Clean Power Plan regulating carbon dioxide emissions under Section 111 of the Act was impermissible.

B. EPA's Failure to Make the Requisite Endangerment Finding under Section 108 of the Act Is a Fatal Flaw of the Clean Power Plan

Although there are endangerment provisions in both Title I and Title II of the Act, only the endangerment provision in Section 108 authorizes EPA to regulate pollutants in the "ambient air" emitted by "numerous or diverse" sources. On the other hand, the Section 111(b) endangerment language, which was not created for ubiquitous substances like carbon dioxide, permits regulation of stationary sources only from a specific "*category* of sources . . . [which] causes, or contributes

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[2] The only potential exception applies to certain stationary sources located in Prevention of Significant Deterioration ("PSD") areas that emit "greenhouse gases." EPA's regulation of mobile source greenhouse gas emissions under Title II triggered regulation of greenhouse gas emissions from stationary sources in PSD areas if they were already subject to PSD regulatory requirements. Such sources have been referred to by the Supreme Court as "anyway" sources. *See UARG*, 134 S. Ct. at 2447-49.

significantly to, air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphasis added). Thus, the endangerment finding provision of Section 111(b) differs markedly from that set forth in Section 108, because it requires EPA to make an endangerment finding that is not only specific to *each stationary source category* that EPA seeks to regulate but also has a higher "significance" threshold for each source category.

In addition to the two distinct endangerment finding provisions in Title I applicable only to stationary sources, there are two other endangerment finding provisions in Title II applicable only to mobile sources. The first of the Title II provisions, set forth in Section 202, 42 U.S.C. § 7521(a)(1), is applicable to mobile sources such as cars and trucks. The second, set forth in Section 211, 42 U.S.C. § 7545(c)(1), is applicable to fuel additives. Each of these Title II endangerment provisions require a unique "significance" regulatory threshold determination that is inapplicable to the endangerment finding of Section 108. Indeed, none of the endangerment provisions spread across Titles I and II of the Act is exactly the same, and the marked differences between them show that Congress intended each to apply to the specific circumstances addressed in each distinct regulatory program established by the Act. An endangerment finding made under one section cannot substitute for an endangerment finding made under another section. *See Dalton Trucking, Inc. v. United States Environmental Protection Agency*, 808 F.3d at 879 (EPA may not

substitute a finding of "national applicability," required by the Clean Air Act for establishing venue exclusively in the D.C. Circuit, by making a finding of "nationwide scope and effect," required by the Act for establishing venue in various regional courts of appeal.).

EPA's effort to use the endangerment finding provisions of Section 111(b) to bootstrap regulation of carbon dioxide emissions from power plants is inconsistent with and contrary to the structure of the Act, because Section 111 was meant to function as a supplement to the NAAQS program under Sections 108-110 and not as a substitute for it. *See generally*, Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?*, 29 Stan. Envtl. L.J. 283 (May 2010) (the structure of the Act makes EPA's effort to regulate carbon dioxide emissions outside of the NAAQS program impermissible). *See also*, *Food and Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'") (internal citations omitted). Accordingly, when EPA seeks to regulate an ubiquitous air pollutant such as carbon dioxide, which is emitted from "numerous or diverse" sources, it must make its endangerment finding, if at all, under the NAAQS regulatory program for criteria pollutants and not under the Section 111 program governing emissions from specific categories of stationary

sources causing more localized problems. To hold otherwise would be to allow EPA unfettered discretion to cherry-pick particular terms out of the Act to support actions inconsistent with the Act's structure. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) ("In expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole law, and its object and policy") (quoting *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)).

C. No Deference Should Be Afforded to EPA's Decision To Promulgate the Clean Power Plan Under Section 111(d) of the Act

The specific language of Section 108 is clear. Emissions from "numerous or diverse" sources that endanger human health or welfare must be regulated, if at all, as NAAQS criteria pollutants under Sections 108-110, and there is no ambiguity in the language. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

An agency interpretation that is inconsistent "with the design and structure of the statute as a whole" does not merit deference. *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2529 (2013). Title I authorizes EPA to institute controls over pollutants in the "ambient air" emitted by "numerous or diverse" sources under the NAAQS program *only* when it follows the regulatory steps

set forth in Sections 108-110. As a supplement to the NAAQS program, and not as a replacement for it, Congress authorized EPA to regulate air pollutants for specific categories of sources under the source performance standards of Section 111. *Train*, 545 F.2d at 327. Accordingly, carbon dioxide emissions, which are emitted into the ambient air from numerous and diverse sources, should not have been regulated by EPA under the source-specific performance standards of Section 111, and no deference need be accorded to EPA's decision to promulgate the Clean Power Plan under that section of the Act.

The Act's legislative history supports this analysis. EPA must proceed under the NAAQS program with regard to "all those pollutant agents or combinations of agents which have, or can be expected to have, an adverse effect on health and welfare and which are emitted from widely distributed mobile or stationary sources." Legislative History, Clean Air Act Amendments, Vol. 1 at 454. *See Train*, 545 F.2d at 326. *See also*, *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 857 (D.C. Cir. 1972); *Indiana and Michigan Electric Co. v. EPA*, 509 F.2d 839, 841 (7th Cir. 1975).

In its efforts to reduce carbon dioxide emissions from electric generation units, EPA seeks to regulate the Nation's electric generating industry, including the entire electric grid, by mandating the closure or redesign of fossil fuel-fired electric generating units and requiring the construction of replacement electric generation sources using renewables. 80 Fed. Reg. 64,662-01 (Oct. 23, 2015). This forced fuel

switch puts at significant risk not only the Nation's grid reliability, but also jobs in the fossil fuels and related industries. Because of its ubiquitous nature, carbon dioxide is everywhere and in everything, including in emissions from fossil fuel-fired power plants. The NAAQS program of Sections 108-110 was intended to cover such emissions. Significantly, EPA has never before used Section 111(d) to regulate these types of emissions. This is the kind of "unheralded power" hitherto undiscovered in a "long-extant statute" that the Supreme Court instructs should be greeted with "skepticism," especially where, as here, a regulatory agency's use of such power has "vast economic and political significance." *UARG*, 124 S. Ct. at 2444. Accordingly, rather than giving deference to EPA's decision to regulate power plant emissions of carbon dioxide under Section 111(d), EPA's decision should be met with a healthy dose of "skepticism."

II

EPA MAY NOT REGULATE EMISSIONS FROM POWER PLANTS UNDER SECTION 111 OF THE CLEAN AIR ACT BECAUSE SUCH EMISSIONS ARE ALREADY REGULATED UNDER SECTION 112 OF THE ACT

"EPA may *not* employ [Section 111(d)] if existing . . . sources of the pollutant in question are regulated under the . . . 'hazardous air pollutants' program of [Section 112]." *American Electric Power Company*, 131 S. Ct. at 2537 & n.7 (emphasis added). EPA first regulated coal- and oil-fired electric generating units under Section

112 on December 20, 2000, 65 Fed. Reg. 79,825, 79,830, and on February 16, 2012, issued additional regulations under Section 112, further subjecting such fossil fuel-fired power plants to stringent emissions limitations. *See* 77 Fed. Reg. 9304 (Feb. 16, 2012).[3] Two years later, and four years after the Supreme Court decided *American Electric Power Company*, EPA promulgated the Clean Power Plan, using Section 111(d) of the Act to regulate carbon dioxide emissions from those same fossil fuel-fired power plants, notwithstanding the Supreme Court's instruction not to do so. Accordingly, EPA's promulgation of the Clean Power Plan under Section 111(d) to regulate emissions from fossil fuel-fired power plants already regulated under Section 112 is impermissible.

The plain meaning of the Act requires this conclusion. Section 111(d) provides that EPA may

> . . . prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which . . . establishes standards of performance for any existing *source* for any air pollutant . . . which is *not* . . . emitted from a *source category* . . . regulated under section 7412 . . . .

42 U.S.C. § 7411(d) (emphasis added). The unambiguous language states that EPA may promulgate emissions standards under Section 111(d) for existing sources only

[3] In 2008, this Court held that EPA could not remove electric generating units from Section 112 because it failed to follow statutory requirements. *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008).

if the source category to be subject to those standards is not already regulated under Section 112. That language must be given effect as written. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (specific content and context of language used by Congress drives statutory construction).

Significantly, until its proposal of the Clean Power Plan, EPA had never sought to regulate source emissions under Section 111(d) when emissions from such sources were already regulated under Section 112. The only two instances where EPA regulated source emissions under both sections occurred where the Section 111(d) regulation *preceded* the Section 112 regulation. *Compare* 44 Fed. Reg. 29,828 (May 22, 1979) (Section 111(d) regulations for Kraft Paper Mills) *and* 63 Fed. Reg. 18,501, 18,501-03 (Apr. 15, 1998) (Section 112 regulations for Kraft Paper Mills); *compare* 64 Fed. Reg. 60,689 (Nov. 8, 1999) (Section 111(d) regulations for municipal solid waste landfills) *and* 66 Fed. Reg. 2219, 2227 (Jan. 11, 2001). The Act does not explicitly prohibit regulation of source categories under Section 112 where emissions from such sources are *already regulated* under Section 111(d). But the plain language of the Act does prohibit the converse—regulation of sources under Section 111(d) where such source categories are already regulated under Section 112. EPA has never before issued Section 111(d) regulations for a source category that was already subject to regulation under Section 112. Its efforts to torture the plain meaning of the Act are

unavailing. *UARG*, 134 S. Ct. at 2445 (EPA has no power to tailor the Clean Air Act to meet "bureaucratic policy goals.").

The Legislative History of the Act supports the plain meaning of Section 111(d). Prior to 1990, Section 112 was intended to control specific hazardous air pollutants injurious to human health by authorizing EPA to set stringent national emissions standards for particularly dangerous air pollutants. The 1990 Amendments to the Act effectively changed the focus of Section 112 from direct regulation of hazardous air pollutants based on health effects to regulation of specific sources of pollutants based on application of technological emissions controls. *See* Daniel Brian, *Regulating Carbon Dioxide Under the Clean Air Act as a Hazardous Air Pollutant*, 33 Col. J. Envtl. L. 369 (2008). During the amendment process, Congress enacted two versions of Section 111(d) in the Statutes at Large. The House version adjusted the corresponding provision of Section 111(d) to reflect the change in focus of Section 112 by prohibiting EPA from establishing Section 111(d) regulations "for any existing *source* for any air pollutant . . . emitted from a *source category* which is regulated under Section 112." Pub. L. No. 101-549, § 108(g), 104 Stat. at 2399, 2467 (emphasis added). But, the Senate version adjusted the cross reference by prohibiting EPA from establishing Section 111(d) regulations "for any existing source for any *air pollutant* . . . included on a list [under Section 112]." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2474 (emphasis added). Thus, while the House version properly reflected the

change in Section 112 by prohibiting the dual regulation of a "source category," the Senate version did not reflect that change but prohibited dual regulation of "pollutants," reflecting the pre-1990 version of Section 112.

Only the House version of Section 111(d) was codified in the United States Code, because it was consistent with the source-specific changes made to Section 112, while the Senate version was not. ("The codifier's notes to this section of the Official Committee Print of the executed laws states that the Senate amendment 'could not be executed' because of the other amendment to section 111(d) contained in the same Act.") *See* 70 Fed. Reg. 16,030-31 (Mar. 29, 2005). Codification in the United States Code is prima facie evidence of the validity of the language as codified. *See Stephan v. United States*, 319 U.S. 423, 426 (1943). Significantly, EPA has acknowledged that "a literal reading of the House language would mean that EPA cannot regulate [air emissions under Section 111(d)] from a source category regulated under section 112." 70 Fed. Reg. at 16,032. Moreover, EPA has acknowledged that the Senate amendment is a "drafting error" and therefore should not be considered as either binding or effective. *See* 70 Fed. Reg. at 16,031-32. The type of scriveners error that appears in the Senate version is not uncommon in "enormous and complex statutes" and "cannot create an ambiguity" of itself. *See American Petroleum Institute v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

At most, if any effect should be given to the Senate version, it must be in a way that is consistent with the House version. Because the House version prohibits dual regulation of "sources," while the Senate version prohibits dual regulation of "pollutants," the way to reconcile the two is to give effect to both. Accordingly, regulation under Section 111(d) would be prohibited if either the same pollutant or the same source is regulated under Section 112. *See Morton v. Mancari*, 417 U.S. 353, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

III

EPA FAILED TO MAKE THE REQUIRED ENDANGERMENT FINDING UNDER SECTION 111

As a prerequisite to regulating emissions under Section 111, the Act requires EPA to make a determination that pollutants from the source category it seeks to regulate "cause[s] or contribute[s] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Importantly, while this endangerment finding provision is set forth in Section 111(b), which governs emissions from new sources, it is also the *regulatory prerequisite* for governing existing sources under Section 111(d). Thus, the Act requires that EPA must establish valid standards of performance for new sources under Section 111(b)

before it can regulate existing sources from the same source category under Section 111(d). *Id.*

EPA's proposed Section 111(b) rule for new sources stated that it need not make an endangerment finding in connection with carbon dioxide emissions from fossil fuel-fired power plants because it had already made an endangerment finding for a *different* pollutant emitted by such sources and, therefore, only needed a "rational basis" for expanding the new source performance standards for carbon dioxide. 79 Fed. Reg. 1430, 1454 (Jan. 8, 2014). In response to comments filed by the public, EPA elaborated on the "rational basis" argument by declaring that its endangerment finding in connection with greenhouse gas emissions from mobile sources under Section 202 of the Act was sufficient to comply with the endangerment finding requirement of Section 111(b). 80 Fed. Reg. 64,510, 64,531-38 (Oct. 23, 2015). Neither argument has merit.

Under the Act, EPA must make both a source-specific and a pollutant-specific endangerment finding before issuing standards of performance under Section 111(b).

To satisfy the endangerment finding requirement, EPA must find that a "category of *sources* . . . causes, or contributes *significantly* to, *air pollution* which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411 (emphasis added). The plain language requires EPA to make an endangerment determination that is (1) pollutant-specific, (2) source-specific, and (3) includes a

significance finding with regard to the "air pollution" at issue. Accordingly, to sustain the Clean Power Plan, EPA must find that carbon dioxide emissions from fossil fuel-fired power plants cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. EPA did not make that finding here. 80 Fed. Reg. at 64,530-31. Instead, it took the position that a "rational basis" for regulating carbon dioxide emissions from fossil fuel-fired power plants is sufficient. That impermissibly rewrites the Clean Air Act. *See UARG*, 134 S. Ct at 2444.

Moreover, the so-called "rational basis" proffered by EPA is not a rational basis at all. EPA takes the position that it can use the endangerment finding it made for new mobile sources under Section 202(a) to support its regulation of new stationary sources under Section 111(b). 80 Fed. Reg. at 64,530-38. That cannot be, for four reasons. First, the structure of the Act requires that a mobile-source-specific endangerment finding be made before new mobile sources can be regulated under Section 202(a) of Title II, and that a separate stationary-source-specific finding be made before new stationary sources may be regulated under Section 111(b). If Congress had intended to collapse the two findings into a single, comprehensive endangerment finding for mobile and stationary sources of any particular pollutant, it could have easily done so, but it did not.

Second, as indicated, the plain meaning of the Act requires a stationary-source-and-pollutant-specific endangerment finding before any stationary source can be regulated under Section 111(b).

Third, the statutory language authorizing the two findings are not identical. The Section 111(b) language permits regulation of stationary sources only from "a *category of sources* . . . [which] *significantly* causes or contributes significantly to air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphasis added). In contrast, the Section 202(a) language broadly includes all mobile emission sources of any given pollutant. 42 U.S.C. § 7521(a)(1). Thus, Section 111(b) is more demanding because it requires EPA to make an endangerment finding that is not only specific to each stationary source category that EPA seeks to regulate, but also has a higher "significance" threshold for each source category not found in Section 202(a).

Fourth, EPA's endangerment finding made in 2009 under Section 202(a) covered "six greenhouse gases taken *in combination*." 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (emphasis added). By contrast, EPA's endangerment finding under Section 111(b) applies only to carbon dioxide, 79 Fed. Reg. 1430, 1455 (Jan. 8, 2014), a single component of the aggregate greenhouse gases for which the endangerment finding was made under Section 202(a). Accordingly, EPA's efforts to bootstrap the stationary source finding onto the mobile source finding by inventing a "rational basis" test found nowhere in the Clean Air Act are ineffective. It is a "rudimentary

principle" of administrative law that regulatory action must comply with statutory requirements. *Bennett v. Spear*, 520 U.S. 154, 172 (1997). EPA is not permitted to selectively weave separate provisions of the Act governing entirely different types of sources, or entirely different types of pollutants, into a fabric that is foreign to the text and structure of the Act. "[S]tatutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *URAG*, 134 S. Ct. at 2442 (quoting *Robinson*, 519 U.S. at 341).

IV

THE CLEAN POWER PLAN UNCONSTITUTIONALLY USURPS POWERS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

"Air quality regulation under the [Clean Air Act] is an exercise in cooperative federalism." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). The Clean Power Plan strays from that foundational fact, seeking to coerce states into implementing a federal regulatory program in violation of the Tenth Amendment.

The "fundamental purpose" of the federal structure created by the Constitution is to "secure to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992). The Tenth Amendment embodies that purpose by reserving to the states and the people "powers not delegated to the United States." U.S. CONST. amend. X. Consequently, "if a power is an

attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156.

The Tenth Amendment applies with particular force in the context of the Clean Air Act, and courts have readily negated EPA's attempts under the Act to infringe upon state sovereignty protected by the Tenth Amendment. For example, the Ninth Circuit rejected EPA's claim that the Act empowered it to compel California's compliance with an EPA transportation control plan, which "directed . . . California to undertake those tasks assigned to it" by EPA, including instituting of a vehicle inspection program, limiting the use of motorcycles, and creating bus and carpool lanes. *Brown v. EPA*, 521 F.2d 827, 830 (9th Cir. 1975). To avoid constitutional issues, the court refused to construe the statute to grant EPA power that "would reduce the states to puppets of a ventriloquist Congress." *Id.* at 837, 839. Similarly, the Fourth Circuit squelched EPA's effort to require Maryland to enact comparable programs, observing that a statute may not "be construed to permit [EPA] . . . to direct a state legislature to legislate." *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975).

To avoid constitutional issues, the Clean Air Act should not be interpreted to authorize EPA to intrude upon the traditional authority of states over in-state power resources. *See FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (national electric power system is characterized by a "bright line" divide between federal authority over wholesale sales in interstate commerce regulated by FERC and state

authority over planning, siting, and providing generation resources to local customers). No federal agency may disrupt "the ususal constitutional balance between the states and the Federal Government" in an area traditionally regulated by states unless the statute under which the federal agency acts is "abundantly clear" and "compel[s] the intrusion." *United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424, 428 (D.C. Cir. 2013). Here it is not "abundantly clear" that the Act authorized EPA to require states to regulate the entire system of power generation within each state. To the contrary, it is "abundantly clear" that the Act does not even authorize EPA to do so on its own, let alone require states to do what it cannot do itself.

Section 111(d) of the Act authorizes EPA to regulate emissions through *performance standards*. EPA's Clean Power Plan establishes a carbon dioxide regulatory scheme for the states based upon three building blocks, only the first of which sets performance standards: (1) increasing efficiency at coal-fired power plants; (2) substituting natural gas for coal; and (3) substituting renewable resources, such as wind and solar, for fossil fuels. 80 Fed. Reg. at 64,662-01, 64,745. Building blocks 2 and 3 are not authorized by the Act because they do not set performance standards. Rather, they dictate the manner by which states determine the mix of resources that will be utilized by power plants to generate in-state power.

EPA asserts authority to "shift generation from dirtier to cleaner sources." 80 Fed. Reg. at 64,726. But when it struck EPA's so-called Tailoring Rule regulating

emissions of greenhouse gases from certain stationary sources, the Supreme Court observed that "when an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *UARG*, 134 S. Ct. at 2444 (citation and quotes omitted). EPA claims to have found in Section 111(d) a long-extant provision, namely, the power to transform the nation's energy grid by dictating to the states how to allocate state resources. The text of Section 111(d) does not provide EPA with any such authority.

Section 111(d) authorizes EPA only to establish "standards of performance for any existing source" that reflect emission reductions through improvements to a source's performance. 42 U.S.C. § 7411(d)(1)(A). A "standard of performance" is "appl[icable] . . . to a particular source," *id.* § 7411(d)(1)(B), and sets forth "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction," *id.* § 7411(a)(1). Section 111(d) thus addresses the reduction of emissions by improving a source's "performance" through measures that can be applied to the source. The Clean Power Plan exceeds EPA's authority under Section 111(d) because building blocks 2 and 3 are not measures that can be applied to an individual source's "performance." Rather, the Clean Power Plan imposes measures that favor the use of renewable resources over fossil fuels. 80 Fed. Reg. at 64,745. That impermissibly

strays beyond improving performance or efficiency at individual existing power plants because it seeks to dictate each state's use of specific types of fuels to generate electricity.

EPA argues that Section 111(d) empowers the agency to set emissions targets based on any measures achievable by a source's owners and operators, including measures that "shift generation from dirtier to cleaner sources" within the "complex machine" energy grid. 80 Fed. Reg. at 64,726, 64,767-68. But the plain text of Section 111(d) provides EPA with authority to regulate emissions only by applying pollution control technology or operational and design advances that improve a source's "performance." 42 U.S.C. § 7411(d)(1)(B). Section 111(d) does not permit EPA to regulate the entire electric grid as a "complex machine" or otherwise, or to favor certain methods of energy generation over others. 80 Fed. Reg. at 64,726, 64,767-68.

It is abundantly clear that Congress did not intend for EPA to use Section 111(d) to transform the national energy grid, picking winners and losers among existing power generation stationary source categories in the process. It is also abundantly clear that Congress did not intend for EPA to dictate to the states actions which EPA itself is not authorized to take.

CONCLUSION

For these reasons, the Clean Power Plan should be vacated and remanded.

DATED: February 23, 2016.

Respectfully submitted,

THEODORE HADZI-ANTICH
Pacific Legal Foundation

ROBERT HENNEKE
LEIGH THOMPSON
Texas Public Policy Foundation

/s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH
Attorneys for Amici Curiae
Pacific Legal Foundation, et al.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated February 23, 2016

/s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CORPORATE AND FINANCIAL DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 26.1, 29(c) AND D.C. CIRCUIT LOCAL RULE 26.1

Proposed *Amici* for Petitioners Pacific Legal Foundation, Texas Public Policy Foundation and Loggers Association of Northern California are nonprofit organizations and therefore do not have parent corporations. Proposed *Amici* Morning Star Packing Company and Merit Oil Company do not have parent corporations. Proposed *Amicus* Norman R. "Skip" Brown is an individual resident of California. No publicly held corporation owns 10% or more of the stock of the Proposed *Amici*.

DATED: February 23, 2016.

/s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, I filed the foregoing document through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users. I also caused the foregoing to be served via U.S. First Class Mail on counsel for the following parties at the following addresses.

Janice M. Alward
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Kelvin Allen Brooks
Office of the Attorney General
33 Capitol Street
Concord, NH 03301-6397
Counsel for Movant-Intervenor State of New Hampshire

Patrick Burchette
Holland & Knight LLP
800 17th Street, NW, Suite 1100
Washington, D.C. 20006-6801
Counsel for Petitioners Northeast Texas Electric Cooperative, Inc., Tex-La Electric Cooperative of Texas, Inc., East Texas Electric Cooperative, Inc. and Sam Rayburn G&T Electric Cooperative, Inc.

William F. Cooper
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Counsel for Movant-Intervenor State of Hawaii

David Finley Crabtree
Deseret Power
10714 South Jordan Gateway
South Jordan, UT 84092
Counsel for Deseret Power

Tannis Fox
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Counsel for Movant-Intervenor State of New Mexico

Karen R. Harned
National Federation of Independent Business
1201 F Street, NW, Suite 200
Washington, D.C. 20004
Counsel National Federation of Independent Business

Sam Kazman
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, D.C. 20036
Counsel for Competitive Enterprise Institute

Jacob Larson
Environmental Law Division
321 E. 13th Street, Room 18
Des Moines, IA 50319
Counsel for Movant-Intervenor State of Iowa

Carrie Noteboom
New York City Law Department
100 Church Street
New York, NY 10007
Counsel for Movant-Intervenor City of New York

Steven J. Oberg
Lynn, Jackson, Shultz & Lebrun, P.C.
P.O. Box 8250
Rapid City, SD 57709
Counsel for Petitioner Rushmore Electric Power Cooperative, *Inc.*

Ben H. Stone
Balch & Bingham LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Counsel

Luther J. Strange III
Office of the Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130
Counsel for Petitioner State of Alabama

Laurence Tribe
Harvard Law School
1563 Massachusetts Avenue
Cambridge, MA 02138
Counsel for Movant-Intervenor Peabody Energy Corporation

Thiruvendran Vignarajah
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202-2021
Counsel for Movant-Intervenor State of Maryland

Janet F. Wagner
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Philip Zoebisch
28 W. Madison Avenue
Collingswood, NJ 08108
Counsel for Amicus Curiae for Petitioner

DATED: February 23, 2016.

/s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH